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**Datasheet for the decision
of 24 April 2009**

Case Number: T 1923/06 - 3.2.04

Application Number: 01113771.8

Publication Number: 1162353

IPC: F02B 41/00

Language of the proceedings: EN

Title of invention:
High efficiency engine

Applicant:
Amos Bonazzoli

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Relevant legal provisions (EPC 1973):
EPC Art. 84, 134

Keyword:
"Request to postpone oral proceedings due to illness of the Applicant (not allowed)"
"Clarity (no)"
"Added subject-matter (yes)"

Decisions cited:
T 0275/89

Catchword:
-



Case Number: T 1923/06 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 24 April 2009

Appellant:

Amos Bonazzoli
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Representative:

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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 31 July 2006
refusing European application No. 01113771.8
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: M. Poock
Members: A. de Vries
C. Heath

Summary of Facts and Submissions

- I. European patent application No. 01113771.8 was refused by the Examining Division with the decision of 31 July 2006.
- II. The application was filed in the name of the Applicant by a representative (in the following "Professional Representative") who is mentioned in the list of professional representatives of the European Patent Office, and was accompanied by an authorisation form signed by the Applicant. With this form the Applicant authorises the Professional Representative to represent him as Applicant or Patent Proprietor, and to act on his behalf for him in all proceedings established by the European Patent Convention concerning this application.
- III. Claim 1 in the form underlying this decision was filed with the letter of 13 July 2006 and reads as follows:
- "A high efficiency non polluting piston engine, including at least a cylinder and at least a piston movable in said cylinder, said piston having a piston head and said cylinder having a cylinder head, said at least a cylinder comprising a chamber in said cylinder head, said chamber having a size proportional to a swept volume and power of said engine, and pressurized air supplying means for supplying pressurized air to said chamber through inlet valve means arranged in said cylinder and controlled by said piston, said inlet valve means communicating said chamber with said piston head and being opened at an exhausting stroke of said piston before a top dead center of said piston and

closed after said top dead center, characterized in that said engine comprises expanded air exhausting valve means in said cylinder head, and that said pressurized air supplying means comprise a high pressure air tank coupled through a pressure reducing unit to a small volume low pressure air tank having a variable pressure, said low pressure tank being coupled through a solenoid valve to said inlet valve means, and that said high pressure air tank supplies said chamber with air in a first fixed adjustment supplying manner to control a minimum RPM of said engine and in a second variable adjustment manner to control an acceleration of said engine".

IV. The appeal was lodged on 29 September 2006 and the prescribed fee was paid simultaneously. The statement of grounds of appeal was received on 30 November 2006.

V. The Appellant (Applicant) requested:

- with a main request, interlocutory revision on the basis of the claims as filed with letter of 13 July 2006, the description pages 4, 5, 6 and figures 4 and 5 as filed with the statement of grounds of appeal, and to immediately remit the application to the Examining Division,
- with an auxiliary request, interlocutory revision on the basis of the same documents as the main request and to remit the application to the Examining Division,

- in the alternative, that the Board of Appeal sets aside the decision under appeal based on the documents of the main request,
- that the Appellant is permitted to submit further auxiliary requests with further amended claims,
- that oral proceedings are arranged if a favourable decision could not be issued by the Examining Division or the Board of Appeal during the written stage of the proceedings.

VI. The arguments of the Appellant can be summarised as follows:

The amendments in the application and the drawings do not add new matter because their subject-matter is identically disclosed in the application as originally filed. The documents cited by the Examining Division relate to engines, yet the construction and function thereof is very different from the claimed engine. Since the US Examining Division has granted a patent on the same subject-matter, the application cannot be objected to due to lack clarity, novelty and inventive step and that the invention disclosed therein cannot be carried out by a skilled person.

VII. The Appellant was then summoned to oral proceedings appointed for 24 April 2009.

In the annex to the summons, the Board indicated its preliminary view according to which the application did not meet the requirements of Articles 83, 84, and

123(2) EPC. The respective part of the annex reads as follows:

"1. The following amendments in claim 1 in the version as filed with letter of 13 July 2006 require particular attention:

1.1 "said at least a cylinder comprising a chamber in said cylinder head": it appears that the application provides a basis for this feature only in that a pre-chamber is provided in the cylinder head. Therefore it does not appear that the requirements of Articles 123(2) and 84 EPC are met.

1.2 "said chamber having a size proportional to a swept volume and power of said engine": the application does not define the term "swept volume" and it is not apparent what is meant with this term in claim 1. Moreover, it is unclear which limitations such feature imply, in particular whether it means that the size is proportional to a volume of power. Therefore, it will have to be discussed whether the requirements of Article 84 EPC are met.

1.3 Supplying pressurised air to said chamber "through inlet valve means arranged in said cylinder and controlled by said piston": the application has no basis for an inlet valve provided in the cylinder. It appears from the application (see for example pages 5, paragraph 2) that the inlet valve is provided in the cylinder head. Therefore, it does

not appear that the requirements of Article 123(2) EPC are met.

1.4 "said inlet valve means communicating said chamber with said piston head": it appears that it is the space 7 that communicates with the chamber and not the piston head. Therefore, it has to be discussed whether the requirements of Article 84 are met.

1.5 "that said engine comprises expanded air exhausting valve means in said cylinder head": it is not apparent what is meant by the term "expanded" and whether this term has a basis in the application as filed. Moreover claim 6 as filed originally recited a plurality of exhausting valves whereas in this feature "valve means" could mean also only one valve. Also the feature from claim 6 as filed originally that the exhausting valves operating synchronously with the remaining part of the system has been omitted. Therefore it will have to be discussed whether the requirements of Articles 84 and 123(2) EPC are met.

1.6 "that said pressurized air supplying means comprise a high pressure air tank coupled through a pressure reducing unit to a small volume lower pressure air tank having a variable pressure": on page 6, paragraph 4 it is stated that the low pressure tank has a volume of a few litres. However, it is questionable whether this disclosure is a basis for the amendment to a small volume low pressure air tank. Therefore, it will have to be investigated whether the requirements of Article 123(2) EPC are met.

Moreover it is not apparent how an air tank can have a variable pressure. In any case, this feature appears to contradict description page 5, paragraph 4 in which it is stated that pressurised air is injected at a given, i.e. fixed pressure. Therefore, it will have to be investigated whether the requirements of Article 84 EPC are met.

- 1.7 "said low-pressure tank being coupled through a solenoid valve to said inlet valve means": no clear basis can be found that the low pressure tank is coupled through a solenoid valve to the inlet valve.

- 1.8 "that said high-pressure air tank supply said chamber with air in a first fixed adjustment supplying manner to control a minimum RPM of said engine and in a second variable adjustment manner to control an acceleration of said engine": the terms "first fixed adjustment supplying manner" and "second variable adjustment manner" are not explained in the description and it is not clear how they could be put into practice by the skilled person. Therefore it will have to be investigated, whether the requirements of Article 83 and 84 are met. Moreover no basis can be found that the high-pressure air tank supplies the air in these manners. Therefore, it will have to be investigated whether the requirements of Article 123(2) EPC are met.

2. *Novelty and inventive step*

If, in the oral proceedings, the application is found to meet the requirements of Articles 83, 84 and 123(2) EPC, then the Board intends to discuss whether its subject-matter is novel and involves an inventive step, in particular having regard to the documents D1 and D2 cited by the Examining Division.

3. *It is emphasised*

- that these remarks are preliminary and intended merely as a guide to the Appellant and has no binding effect on the Board in the further appeal proceedings,
- that at the end of the oral proceedings, the case should be ready for decision (see Article 15(5) Rules of Procedure of the Boards of Appeal of the European Patent Office (RPBA), and
- that any amendment should be filed at least one month before the date set for the oral proceedings in order to give the Board sufficient time to prepare for the oral proceedings. The attention of the Appellant is drawn to Articles 12 and 13 of the Rules of Procedure of the Boards of Appeal".

VIII. No response was received within the time limit specified in this annex. However, on 22 April 2009, that is less than two days prior to the scheduled oral

proceedings, a fax from the Professional Representative was received asking to postpone the oral proceedings. The relevant passage reads as follows:

"Please be informed that our client, the Applicant, is experiencing a period of serious health problems.

For the time being it has been impossible to contact him and discuss the matter properly.

Therefore, we kindly ask you to postpone the oral procedure for health reasons, that goes beyond our will.

Hoping the request will be accepted since it comes from an objective difficult situation, we remain ...".

IX. After the Registrar of the Board had informed the patent firm of the Professional Representative that the oral proceedings would be held as scheduled, a fax of an Attorney at Law was received on 23 April 2009 explaining that the illness of the Appellant has not yet been identified but that medical tests will be concluded on 24 April 2009. However, the time when the Appellant would be available for oral proceedings could only be estimated after a full medical certificate was issued by the doctor or the hospital.

In his view, the presence of the Appellant in the oral proceedings was essential to explain the concept of the patent based on a three years ongoing engine testing period. The available data would show how the concept worked, also in terms of energy efficiency.

- X. Oral proceedings before the Board were held as scheduled on 24 April 2009. Neither the duly summoned Appellant nor his Professional Representative were present. In accordance with Rule 71(2) EPC 1973, the proceedings were continued in their absence.

Reasons for the Decision

1. The appeal is admissible.
2. *Postponement of oral proceedings due to illness of the Applicant*
 - 2.1 According to the "Notice of the Vice-Presidents Directorates-General 2 and 3 dated 1 September 2000 concerning oral proceedings before the EPO" (see item 2.2; OJ EPO 2000, 456), oral proceedings can be postponed only if the party concerned can advance serious reasons which justify the fixing of a new date. However, the request to fix another date shall be filed as soon as possible after the grounds preventing the party concerned from attending the oral proceedings have arisen.

In the present case the Board was informed by the Professional Representative by fax received on 22 April 2009, only two-days before the date scheduled for the oral proceedings of the Applicant's serious health problems. The fax states: "For the time being it has been impossible to contact him [the Applicant] and discuss the matter properly".

2.2 The illness of a duly represented party is not a sufficient reason for postponing appointed oral proceedings unless the party who is ill needed to be present (see T 275/89, headnote 1, OJ 1992, 126). A request to change the date of oral proceedings can only be allowed if unforeseen, exceptional circumstances have arisen and are proven which either make oral proceedings impossible (such as an unrepresented party's sudden illness) or might have a decisive impact on the course of the proceedings (such as unforeseen unavailability of an important witness or expert).

2.2.1 In the authorisation form filed with the application it is stated that the Professional Representative is authorised to act for the Applicant in the proceedings concerning this application. Moreover, the Professional Representative is mentioned in the list of professional representatives of the European Patent Office and, according to Article 134(4) EPC 1973, is entitled to act in all proceedings established by the European Patent Convention, thus also in an appeal procedure.

Therefore the Board concluded that the Appellant is duly represented by a Professional Representative.

2.2.2 The Board appreciates that a Professional Representative may be in a difficult situation if he is unable to receive instructions from his client. However, in the present case, the following considerations do not justify postponement of the scheduled oral proceedings.

(a) From the fact that the professional representative was able to formulate the appeal, the Board

concludes that at that point the Applicant must still have been issuing instructions. This is in fact a pivotal stage in the appeal proceedings, as the statement of grounds of appeal shall contain a party's complete case (see Article 12(2) RPBA). Contact with the client is critical for preparing the statement of grounds of appeal much more than at any later stage.

Moreover, the factual framework for the oral proceedings remained essentially the same as the one on which the decision of the Examining Division was delivered. Therefore, the Professional Representative's preparation of the oral proceedings could have been based on the instructions he must have had for the preparation of the oral proceedings before the Examining Division and the statement of grounds of appeal.

- (b) The summons further includes a final date for further submissions (one month before the oral proceedings). By this date the representative will need to have contacted the Appellant for further instructions. At the latest then will he have realised that something is wrong that may require immediate action, such as a request for postponement. No such request was received in this period leading up to the final date for submissions.
- (c) In the light of the above, the Board is not convinced that the client's illness can have had a decisive impact on the representative's

preparation of the oral proceedings or the oral proceedings themselves.

2.2.3 Consequently, the reasons advanced by the Professional Representative did not justify the fixing of a new date for the oral proceedings.

2.3 The fax of the Attorney at Law dated and received on 23 April 2009 does not give rise to any different conclusion.

In this letter engine tests were mentioned but not specified at all. Moreover, they were never mentioned before, neither in the examination nor the appeal procedure. In view of the provisions of Article 12(2) of the Rules of Procedure of the Boards of Appeal (RPBA), they should have been substantiated with the statement of grounds of appeal or, at least, after the summons to the requested oral proceedings were received.

The Appellant's submissions based on these tests therefore could not have been admitted into the proceedings in accordance with Article 13(1) and (3) RPBA.

3. The request to postpone the oral proceedings before the Board, was therefore duly refused.

4. Since the Appellant has not availed himself of the opportunity to amend the application in response to the objections in the annex or to be represented in the scheduled oral proceedings before the Board, the objections set out in the annex remain unchallenged.

Having re-considered its preliminary position, the Board sees no reason to deviate therefrom.

Consequently, for the reasons set out in the annex cited above, the appeal is dismissed.

Order

For these reasons it is decided that:

1. The request for postponement of the oral proceedings is refused.
2. The appeal is dismissed.

The Registrar:

The Chairman:

N. Maslin

M. Poock